
In the Matter of the ORS 656.245 Medical Services Dispute of

Organiz, Jose L., Claimant

Contested Case No: H04-036

PROPOSED & FINAL ORDER

May 25, 2004

JOSE L. ORGANIZ, Petitioner

LIBERTY NORTHWEST INSURANCE, Respondent

Before Rick Barber, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

Insurer appeals an administrative order issued on January 30, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services. The matter was referred to the Office of Administrative Hearings on April 2, 2004.

On May 17, 2004, Administrative Law Judge Rick Barber conducted a telephone hearing originating from Salem, Oregon. Claimant appeared and testified on his own behalf. Insurer was represented by attorney Meg Carman. Insurer called Tracey Young as a witness. Maria Morrison interpreted the hearing for claimant, whose primary language is Spanish. The record closed on the date of hearing.

ISSUE

Whether insurer must pay an attorney fee to claimant's former attorney, as ordered by MRU.

EVIDENTIARY RULINGS

Workers' Compensation Division (WCD) Exhibits 1 through 22, including Exhibits A, B, 7A, 14A and 14B, were received into evidence without objection.

FINDINGS OF FACT

(1) Claimant suffered an injury to his left hand on May 29, 2003, when he cut two fingers on a burger mincing machine. (Ex. A). Claimant underwent immediate amputation revision surgery by Dr. Zegzula. (Ex. B). His claim was closed with an award of permanent impairment on January 8, 2004. (Ex. 14B).

(2) On June 18, 2003, claimant signed a retainer agreement with attorney Mark Thesing. (Testimony of claimant). Thesing terminated the attorney-client relationship by letter dated August 27, 2003. (Ex. 6). Thereafter, Thesing had no ongoing involvement in the claim. (Testimony of Young, claimant).

(3) On September 5, 2003, Dr. Bob Torres submitted his billings to the insurer on a

HCFA form. (Ex. 7). Insurer put the payment of the bills on “hold” because it did not recognize the tax ID number provided by Torres. (Ex. 8). On November 10, 2003, Torres filed a Medical Fee Dispute Resolution Request. (Ex. 10). When insurer received its copy of the request, the examiner immediately paid the bills in question. MRU was contacted and advised that the bills had been paid. ((Ex. 12; Testimony of Young).

(4) After acknowledging that all parties were satisfied bills had been paid, MRU sent an Attorney Fee Request form to Torres and to Thesing, claimant’s former attorney. By letter dated January 26, 2004, Thesing was advised to submit a retainer agreement and a statement of hours “spent on the dispute before MRU, if more than two hours.” (Ex. 18). On January 28, 2004, Thesing wrote the following: *I respectfully request \$1000 in attorney fees on Mr. Organiz’s psychological care case. I believe that I spent approximately 4 hour on this issue. (1) I interviewed the injured worker, (2) I wrote a letter to the treating Doctor Zegzula, (3) I conferenced with Dr. Torres two times and (4) sent a billing packet and information to Dr. Torres.* (Ex. 19).

On January 30, 2004, MRU issued a decision finding that there was no longer a dispute and finding that Thesing was entitled to an attorney fee of \$556.00. (Ex. 20). Insurer requested a contested case hearing to contest the attorney fee ordered by MRU. (Ex. 21).

CONCLUSIONS OF LAW

MRU erred as a matter of law when it awarded an attorney fee to the previous attorney of an unrepresented claimant.

OPINION

This dispute concerning attorney fees arises from a medical fee dispute. Pursuant to ORS 656.327(2), that decision may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. Pursuant to ORS 656.385(1), an attorney fee may be awarded when a claimant prevails in a proceeding before the director.

In this case, although claimant prevailed before the director, a chronology of events makes it clear that MRU erred as a matter of law in awarding an attorney fee in the case. Claimant’s previous attorney, Mark Thesing, resigned as counsel on August 27, 2003. (Ex. 6). Dr. Torres’s initial billings were submitted on September 5, 2003, and his Medical Fee Dispute form was not submitted until November 10, 2003. Consequently, Thesing was not claimant’s attorney at the time of the medical dispute filed by Dr. Torres.

ORS 656.385 states in part:

(1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced before the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant’s attorney. In such

cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant or claimant's attorney.

(Emphasis added).

It is elemental that the only way an attorney may be paid in a medical services claim is if he or she is "claimant's attorney" and is "instrumental" in achieving the resolution of the dispute in claimant's favor. In this case, Thesing was neither. He was not claimant's attorney because he had ended the relationship in August 2003, before this dispute began. He was not instrumental because, having stopped representing claimant in August, he had no involvement in the case after that except to respond to MRU's request for attorney fee information.¹

Since Thesing was no longer representing claimant at the time of the medical dispute, it was legal error for MRU to award him an attorney fee under ORS 656.385, or any other statute. Accordingly, the MRU decision is modified to eliminate the attorney fee.

ORDER

IT IS HEREBY ORDERED that:

1. The Administrative Order dated January 30, 2004 is MODIFIED; Liberty is responsible for the medical bills noted in that Order, but claimant's former attorney is not entitled to an attorney fee.

¹ It is puzzling why Thesing provided information about a fee he could not collect, not having at that point a valid retainer agreement, rather than just letting MRU know he was no longer involved in the case.